SUPREME COURT, U.S.
FILED
FEB 15 2007
OFFICE OF THE CLERK

(2)

No. 06-831

IN THE

Supreme Court of the United States

FLORA B. CADIZ,
Petitioner,

v.

THE BANK OF NEW YORK, TRUSTEE OF AMRESCO RESIDENTIAL MORTGAGE SECURITIES CORPORATION MORTGAGE LOAN TRUST 1997-3,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

ERIC HOUSER
HOUSER & ALLISON, APC
9970 Research Drive
Irvine, CA 92618
(949) 679-1111

BRIAN P. BROOKS
(*Counsel of Record*)
ARTHUR W.S. DUFF
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Respondent

Rule 29.6 Corporate Disclosure Statement

The Bank of New York, Trustee of Amresco Residential Mortgage Securities Corporation Mortgage Loan Trust 1997-3, is a wholly owned subsidiary of The Bank of New York Company, Inc., a publicly traded company.

TABLE OF CONTENTS

Page

CORPORATE DISCLOSURE STATEMENT i

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 4

I. There Is No Conflict Between The Decision Below And Any Decision By Any Other Court Of Appeals 4

II. Nothing About This Case Warrants Certiorari Review 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES

48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.), 835 F.2d 427 (2d Cir. 1987).....6

Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.), 749 F.2d 670 (11th Cir. 1984).....6

Apex Oil Co., Inc. v. Spark (In re Apex Oil Co., Inc.), 406 F.3d 538 (8th Cir. 2005).....5

Bronson v. United States, 46 F.3d 1573 (Fed. Cir. 1995).....6

Citizens Bank & Trust Co. v. Case (In re Case), 937 F.2d 1014 (5th Cir. 1991).....5

Curry v. Castillo (In re Curry), 297 F.3d 940 (9th Cir. 2002).....4, 5

Easley v. Pettibone Mich. Corp., 990 F.2d 905 (6th Cir. 1993).....6

Elias v. United States Trustee (In re Elias), 188 F.3d 1160 (9th Cir. 1999).....5

Fjeldsted v. Lien (In re Fjeldsted), 293 B.R. 12 (9th Cir. BAP 2003).....3

Schwartz v. United States (In re Schwartz), 954 F.2d 569 (9th Cir. 1992).....6, 7

In re Shondel, 950 F.2d 1301 (7th Cir. 1991).....4

In re Siciliano, 13 F.3d 748 (3d Cir. 1994).....6, 7

TABLE OF AUTHORITIES
(continued)

Page

Tasafaroff v. Taylor (In re Taylor),
884 F.2d 478 (9th Cir. 1989).....3

Income Property Builders, Inc. v. Lomas & Mettleton Co.,
699 F.2d 963 (9th Cir. 1982).....5

Job v. Calder (In re Calder),
907 F.2d 953 (10th Cir. 1990).....6, 7

Jones v. Garcia (In re Jones),
63 F.3d 411 (5th Cir. 1995).....6

Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994).....3

Soares v. Brockton Credit Union (In re Soares),
107 F.3d 969 (1st Cir. 1997).....6

Zinchiak v. CIT Small Bus. Lending Corp. (*In re Zinchiak*),
406 F.3d 214 (3d Cir. 2005).....5

STATUTES

11 U.S.C. § 350..... *passim*

11 U.S.C. § 362..... *passim*

11 U.S.C. § 105.....4, 7

RULES

Bankruptcy Rule 924.....5

Sup. Ct. R. 10(a).....5

TABLE OF AUTHORITIES
(continued)

Page

OTHER AUTHORITIES

2 Collier On Bankruptcy § 362.07 7

3 Collier On Bankruptcy § 350.03 5

BRIEF OF RESPONDENT IN OPPOSITION

Petitioner Flora B. Cadiz rests her case for review on an asserted conflict between panels of the Ninth Circuit Court of Appeals. There is no such conflict and, even if there were, it would not provide a basis for this Court to grant review. The opinion below is in full accord with the settled precedents of both the Ninth Circuit and this Court. Bankruptcy courts routinely reopen closed cases for the purpose of amending or annulling the automatic stay. The straightforward application of Sections 350 and 362 of the Bankruptcy Code generates no conflict among the Circuits. Certiorari should be denied.

STATEMENT OF THE CASE

1. Respondent Bank of New York is the holder of a mortgage note secured by Petitioner's residence, described as 94-276 Pupukoae Street, Waipahu, Hawaii, 96797. Pet. App. 3. On October 22, 1998, Respondent filed a foreclosure action against Petitioner in state court after Petitioner defaulted on the terms of her note. Respondent subsequently moved for summary judgment and an interlocutory decree of foreclosure. A few days before the foreclosure hearing, Petitioner filed a voluntary petition under Chapter 13 of the Bankruptcy Code which automatically stayed the hearing on Respondent's motion. Pet. App. 11; 11 U.S.C. § 362(a). The bankruptcy court entered a discharge on May 25, 1999. Pet. App. 9. Petitioner filed a second voluntary bankruptcy petition on December 11, 2000, which the bankruptcy court dismissed on February 1, 2001. Pet. App. 10.

2. On July 15, 2002, Petitioner filed a third voluntary bankruptcy petition, again to prevent a state court foreclosure action brought by Respondent scheduled for July 17, 2002. Pet. Br. 1. The petition listed Respondent as the sole creditor

of the estate. Petitioner failed to notify Respondent or the state court of the petition and did not appear at the meeting of creditors. Pet. App. 9. Likewise, Petitioner neither opposed Respondent's motion for summary judgment nor appeared at the July 17, 2002 hearing. The state court, unaware of Petitioner's bankruptcy petition, granted Respondent's motion for summary judgment and ordered a decree of foreclosure against Petitioner's property.

3. On August 7, 2002, Respondent filed a Notice of Bankruptcy Petition with the state court after learning of Petitioner's bankruptcy filing. The bankruptcy court dismissed Petitioner's bankruptcy petition on September 23, 2002 and set a 240-bar to any new filings. The court entered a final decree closing the case on October 25, 2002.

4. On March 11, 2003, the bankruptcy court granted Respondent's request to reopen the underlying bankruptcy proceeding for the limited purpose of considering Respondent's motion to annul the automatic stay. Pet. App. 1. On June 3, 2003, the court granted Respondent's motion to annul the automatic stay which had the effect of curing any technical violation of the automatic stay under Section 362(a) caused by the post-petition foreclosure action. As grounds for its decision, the bankruptcy court described Petitioner's serial bankruptcy filings as "one of the most flagrant examples of bad faith bankruptcy filing I've seen or heard of . . . filed only to get the advantage of the automatic stay." Pet. App. 12.

5. On appeal, Petitioner argued the bankruptcy court had abused its discretion in concluding that "cause" existed under 11 U.S.C. § 362(d) to retroactively annul the automatic stay. The United States Bankruptcy Appellate Panel of the Ninth Circuit disagreed, reasoning that the equities of the case supported the relief granted. Pet. App. 13 (citing *Fjeldsted v. Lien (In re Fjeldsted)*, 293 B.R. 12, 23-24 (9th

Cir. BAP 2003)). Specifically, the Appellate Panel noted the court had ordered Petitioner to give notice of the bankruptcy filing to "any federal or state court in which the debtor is a party to pending litigation or other proceeding" and warned that failure to provide that notice may "constitute cause for the annulment of the stay." Pet. App. 14-15. In light of Petitioner's failure to provide the required notice and her multiple "bad faith" bankruptcy filings, the Bankruptcy Appellate Panel concluded that the bankruptcy court acted within its discretion and affirmed the order annulling the automatic stay. Pet. App. 15-16.

6. The Ninth Circuit Court of Appeals concluded that the bankruptcy court had jurisdiction to reopen the proceedings, reasoning that "the court was not granting new relief, but rather was simply interpreting and effectuating its prior order." Pet. App. 17 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 379-80 (1994); *Tasafaroff v. Taylor (In re Taylor)*, 884 F.2d 478, 481 (9th Cir. 1989)). Likewise, the Ninth Circuit found no abuse of discretion by the bankruptcy court in retroactively annulling the automatic stay because the Bank of New York had no knowledge of Petitioner's bankruptcy filing at the time of the foreclosure hearing and because Petitioner's multiple bankruptcy filings amounted to "inequitable conduct." Pet. App. 17.

7. On September 13, 2006, the Ninth Circuit Court of Appeals denied Petitioner's petition for panel rehearing and rehearing en banc. This petition was filed on December 12, 2006.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT BETWEEN THE DECISION BELOW AND ANY DECISION BY ANY OTHER COURT OF APPEALS.

Petitioner's argument for certiorari rests on a fictitious conflict within the Ninth Circuit Court of Appeals regarding whether Section 350(b) of the Bankruptcy Code permits the reopening of a bankruptcy case that has been dismissed but not closed. Petitioner's argument proceeds from an incorrect assumption. As the record makes clear, the underlying bankruptcy case was dismissed on September 23, 2002 and closed on October 25, 2002. Pet. App. 12. Thus, whether or not Section 350(b) permits a bankruptcy court to reopen a dismissed case is simply not at issue.[1] On the narrow question of whether Section 350(b) permits a closed bankruptcy case to be reopened for the limited purpose of annulling the automatic stay, there is no conflict either within the Ninth Circuit or among the Circuits.

Section 350(b) of the Bankruptcy Code provides bankruptcy courts authority to reopen a closed bankruptcy proceeding "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). While not specifically defined in the Code, the decision to reopen a case for "other cause" is discretionary with the bankruptcy court. *See, e.g., In re Shondel*, 950 F.2d 1301, 1304 (7th Cir. 1991); *Apex Oil Co., Inc. v. Spark (In re Apex Oil Co., Inc.)*, 406 F.3d 538, 542 (8th Cir. 2005); *Citizens Bank & Trust Co. v.*

---

[1] In any event, the Ninth Circuit has made clear that Section 105(a) of the Bankruptcy Code provides bankruptcy courts broad authority to retroactively annul the automatic stay in dismissed cases, and need not "reopen" a case in such circumstances. *See In Re Castillo*, 297 F.3d 940, 944 (9th Cir. 2002); 11 U.S.C. § 105(a) (a bankruptcy court may issue "any order, process or judgment that is necessary or appropriate to carry out the provisions of this title").

Case (In re Case), 937 F.2d 1014, 1018 (5th Cir. 1991); *Zinchiak v. CIT Small Bus. Lending Corp.* (*In re Zinchiak*), 406 F.3d 214, 224 (3d Cir. 2005); *see also* 3 Collier On Bankruptcy § 350.03[5] ("Because section 350(b) gives the bankruptcy court broad discretion in deciding whether to reopen the case, the decision to grant or deny a motion to reopen is binding on review absent a clearing showing that there was an abuse of discretion."). Panels of the Ninth Circuit likewise have endorsed this interpretation.[2] *See, e.g., Curry v. Castillo (In re Curry)*, 297 F.3d 940 (9th Cir. 2002) ("A bankruptcy court's decision to reopen is entirely within its sound discretion, based upon the circumstances of each case.") (citation omitted); *Elias v. United States Trustee (In re Elias)*, 188 F.3d 1160, 1161 (9th Cir. 1999) (same). In short, the authority of the bankruptcy court to reopen closed cases for "cause" is well-established. Petitioner identifies no conflict on this straightforward application of the Bankruptcy Code and none exists.

It is also clear that, once reopened, the bankruptcy court retains broad discretion to retroactively annul the automatic stay. Specifically, Section 362(d) provides that: "On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay." 11 U.S.C. § 362(d). While uniformly recognizing the bankruptcy court's authority to grant

---

[2] While not relevant for purposes of this petition, *see* Sup. Ct. R. 10(a), there is no merit to Petitioner's contention that the decision below amounts to a *sub silentio* overruling of *Income Property Builders, Inc. v. Lomas & Mettleton Co.*, 699 F.2d 963 (9th Cir. 1982). Pet. 7. That decision simply affirmed the dismissal of an appeal to the Bankruptcy Appellate Panel as moot, where a creditor failed to move to vacate the dismissal of the bankruptcy proceeding within the one year period prescribed by Bankruptcy Rule 924. *Id.* at 965. It had nothing to do with the bankruptcy court's authority to reopen closed cases pursuant to Section 350(b), which is firmly established in the Ninth Circuit.

such relief, the Circuits have differed over whether post-petition actions taken in violation of the Section 362 automatic stay are properly considered "void" or "voidable." On the one hand, the Fifth, Sixth and Federal Circuits have characterized post-petition proceedings taken in violation of the automatic stay as "voidable," and therefore capable of being validated *ex post* through retroactive annulment of the stay. *See, e.g., Jones v. Garcia (In re Jones)*, 63 F.3d 411, 412 & n.3 (5th Cir. 1995); *Bronson v. United States*, 46 F.3d 1573, 1578-79 (Fed. Cir. 1995); *Easley v. Pettibone Mich. Corp.*, 990 F.2d 905, 911 (6th Cir. 1993). On the other hand, the First, Second, Third, Ninth, Tenth and Eleventh Circuits have described such post-petition proceedings as "void." *See, e.g., In re Siciliano*, 13 F.3d 748, 751 (3d Cir. 1994); *Schwartz v. United States (In re Schwartz)*, 954 F.2d 569, 571 (9th Cir. 1992); *Job v. Calder*, 907 F.2d 953, 956 (10th Cir. 1990) (per curiam); *48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. 48th St. Steakhouse, Inc. v. Rockefeller Group, Inc. (In re 48th St. Steakhouse, Inc.)*, 835 F.2d 427, 431 (2d Cir. 1987); *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670, 675 (11th Cir. 1984); *Soares v. Prockton Credit Union (In re Soares)*, 107 F.3d 969, 974 (1st Cir. 1997). Distinguishing between "void" and "voidable" violations of the stay shifts the burden of assessing the validity of a post-petition action from the debtor to the creditor. As the First Circuit explained: "Treating an action taken in contravention of the automatic stay as void places the burden of validating the action after the fact squarely on the shoulders of the offending creditor. In contrast, treating an action taken in contravention of the automatic stay as voidable place the burden of challenging the action on the offended debtor." *Id.* at 974.

As a practical matter, however, even courts characterizing post-petition actions in violation of the automatic stay as "void" have concluded that equitable considerations, such as

the bad faith conduct by the debtor, may provide sufficient grounds for granting relief from the stay. *See, e.g., Albany Partners, Ltd.*, 749 F.2d at 675 (affirming retroactive annulment to validate creditor's foreclosure action where debtor did not file petition in good faith); *Siciliano*, 13 F.3d 748 (annulment of automatic stay may operate to rehabilitate actions taken in violation of automatic stay); *Calder*, 907 F.2d at 956 ("[C]ourts will apply equitable considerations at least where the creditor was without actual knowledge of a bankruptcy petition and the bankrupt's unreasonable behavior contributed to the bankrupt's plight.").

Moreover, the plain language of Section 362 provides the bankruptcy court authority to retroactively annul the automatic stay, thus rendering any distinction between "void" and "voidable" post-petition actions all but irrelevant. Section 362(d) contemplates that a bankruptcy court may grant "relief from the stay" by "annulling, modifying, or conditioning such stay." 11 U.S.C. § 362(d). As commentators have noted, "the use of the word 'annulling' [in § 362(d)] permits the [court's] order to operate retroactively, thus validating actions taken by a party at a time when he was unaware of the stay. Such actions would otherwise be void." 2 Collier On Bankruptcy § 362.07. As such, "[]f a creditor obtains retroactive relief under section 362(d) there is no violation of the automatic stay, and whether violations of the stay are void or voidable is not at issue." *Schwartz*, 954 F.2d at 573.

In short, there is no conflict, either within the Ninth Circuit or among the Circuits, on the application of Sections 350 and 362 of the Bankruptcy Code. Section 350 contemplates that a bankruptcy court may reopen proceedings which have been previously closed. That discretion is consistent with the broad grant of authority found in Bankruptcy Code Section 105(a) which permits the bankruptcy court to issue "any order, process or judgment that is necessary or appropriate to

carry out the provisions of this title." 11 U.S.C. § 105(a). And Section 362(d) allows the court to retroactively annul the automatic stay based on the equities of the case. The decision below does not conflict with decisions from any other Circuit on that interpretation of Sections 350 or 362.

II. NOTHING ABOUT THIS CASE WARRANTS CERTIORARI REVIEW.

Petitioner has advanced no valid reason for the Court to grant review in this case. The petition rests exclusively on a fictitious conflict between the decision below and other decisions with the Ninth Circuit. There is no mention of any conflict with any other Circuit, and none exists.

Nor should this Court be swayed by the alarmist claims catalogued at the end of the petition. Reopening bankruptcy cases for the limited purposes of retroactively annulling the automatic stay does not constitute an "intrusion on the separation of powers between Congress and the Courts." Pet. 9. As discussed, Sections 350(b) and 362(d) of the Bankruptcy Code expressly authorize precisely that form of relief and courts routinely provide such relief without question or conflict. This case involves a narrow question regarding the scope of the bankruptcy court's authority to reopen and retroactively amend prior decisions for "cause." In the many instances in which it has arisen, the issue has proved entirely unexceptional, generating no controversy or conflict among the courts of appeals. There is no reason for this Court to review an issue on which the Circuits are in broad agreement.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

ERIC HOUSER
HOUSER & ALLISON, APC
9970 Research Drive
Irvine, CA 92618
(949) 679-1111

BRIAN P. BROOKS
(*Counsel of Record*)
ARTHUR W.S. DUFF
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300

Counsel for Respondent

Dated: February 15, 2007